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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1018

COLUMBIA PICTURES INDUSTRIES, INC.,
Petitioner,

versus

THE POSTER EXCHANGE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THE POSTER EXCHANGE, INC.,
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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Columbia Pictures Industries, Inc. ("Columbia") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 8, 1975 vacating the grant of Summary Judgment to Columbia and remanding for further proceedings as to it.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 517 F.2d 117. The Order entered September 24, 1975 denying Columbia's petition for rehearing is at

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Appendix p. 1a. The opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, granting summary judgment is not reported; it is reproduced at Appendix pp. 2a-14a.

JURISDICTION

The opinion and judgment of the Court of Appeals were issued on September 24, 1975. By Order of the Supreme Court dated December 18, 1975 (Appendix p. 16a) petitioner received an extension until January 19, 1976 for filing this petition. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals misapplied this Court's holding in the case of *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed. 2d 788 (1971) in failing to apply the collateral estoppel effect of a prior judgment finding no conspiracy among certain motion picture Producers (named as conspirators and defendants in the previous suit), Columbia (named as a conspirator but not a defendant in the previous suit), and National Screen Service Corporation to establish a monopoly in the latter when the subsequent suit, naming as defendants Columbia and certain of the other Producers along with National Screen, rests on the same allegations as the former one.

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, 26 Stat. 209 (15 U.S.C. Sections 1 and 2); Sections 4 and 16 of the

Clayton Act, 38 Stat. 731 and 737 (15 U.S.C. Sections 15 and 16) are reproduced at Appendix pp. 18a-19a.

STATEMENT OF THE CASE

The judicial history of this litigation as stated in the opinion of the Court of Appeals appears at 517 F.2d 119-121. The Court is respectfully requested to review that history, which is important to an understanding of this petition.

Columbia sought rehearing by the Court of Appeals on the grounds urged herein (Appendix pp. 20a-25a), which request was denied without opinion. (Appendix p. 1a).

Briefly, the judicial history shows that Columbia was named in an amended complaint as a co-conspirator with the other major motion picture Producers in an action filed in 1961 against National Screen Service Corporation and the other Producers, with Columbia not being named as a Defendant. The action alleged that Columbia, the other Producers and National Screen conspired to establish a monopoly in National Screen in the production and distribution of standard accessories for motion pictures. Summary judgment was granted as to all conspiracy allegations. *Poster Exchange, Inc. v. National Screen Service Corp.*, 35 F.R.D. 588 (N.D. Ga. 1963), *aff'd sub nom Poster Exchange, Inc. v. Paramount Film Distributing Corp.*, 340 F.2d 320 (5th Cir. 1965). The instant action was filed in 1970 adding Columbia as an additional defendant and alleging that the parties have continued to conspire in the same manner as was

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alleged in the 1961 suit. Summary judgment was granted to all of the Producer defendants on grounds of collateral estoppel. The Court of Appeals affirmed as to the other Producers and reversed as to Columbia. 517 F.2d 117 (5th Cir. 1975).

The Poster Exchange, Inc. has petitioned this Court to issue a writ of certiorari to review the affirmance by the Court of Appeals of the summary judgment in favor of the Producers other than Columbia. This petition has been assigned No. 75-667 and is presently pending. The same number has also been assigned to the petition of Exhibitors Poster Exchange, Inc. for the issuance of a Writ in a companion case also decided by the Court of Appeals on August 8, 1975, reported at 517 F.2d 110.

The distinction asserted by the Court of Appeals in respect of Columbia was not previously urged by any party at any state of this litigation. It appeared for the first time in the Court of Appeals opinion dated August 8, 1975.

REASONS FOR GRANTING THE WRIT

The holding of the Court of Appeals as to Columbia is in direct contradiction to this Court's holding in *Blonder-Tongue Laboratories v. University of Illinois Foundation, supra.* In that case this Court did away with the mutuality requirement for the application of the doctrine of collateral estoppel in subsequent federal question litigation. In so holding this Court noted a concern for fairness to litigants and for conservation of judicial resources. The holding of the Court

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of Appeals is violative of both concerns and the express mandate of *Blonder-Tongue*.

The Court of Appeals determined that vis-a-vis Columbia the judgment that there was no conspiracy in the 1961 suit related only to the allegations of conspiracy between Columbia and the defendant Producers and not to the allegations of conspiracy between Columbia and the defendant National Screen. The court nevertheless determined that, vis-a-vis the Producers named as defendants in the 1961 suit, the judgment of no conspiracy related to both the allegations of conspiracy among the Producers, including Columbia, and the allegations of conspiracy between the Producers and National Screen. The only difference between Columbia and the other Producers lies in the fact that Columbia was not a party to the prior litigation.

The use of a diagram shows how this Court's holding in *Blonder-Tongue, supra* was misapplied. In the 1961 suit Respondent alleged a conspiracy among certain producers and National Screen. A wheel with National Screen at the hub and with the various producers at the end of the spokes is an accurate schematic depiction of that conspiracy.

(See diagram on next page)

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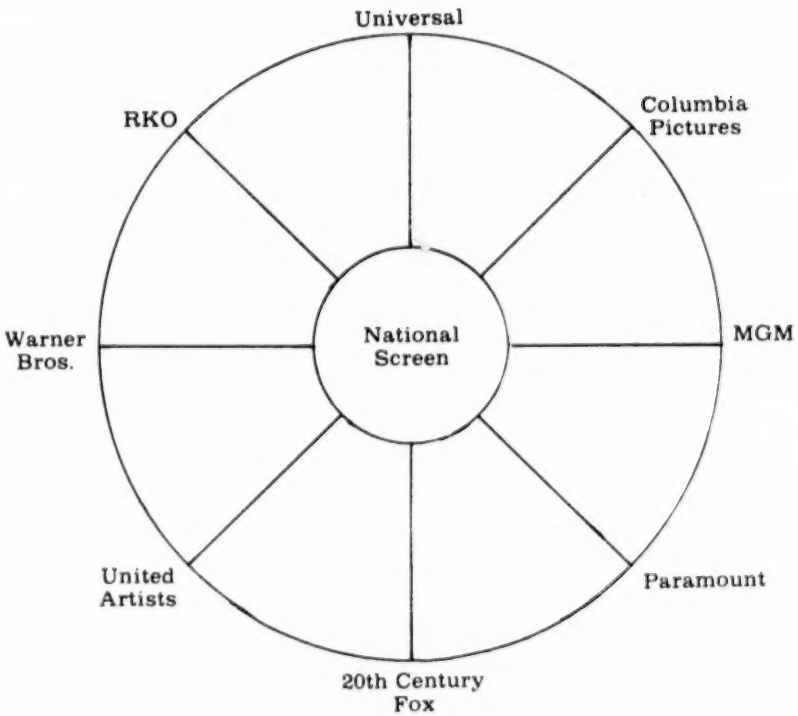

In essence the conspiratorial ties were alleged to have run along the spokes and around the rim. The prior judgment found that there was *no* proof of *any* conspiracy — there were no spokes and no rim.

The Court of Appeals applied the doctrine of collateral estoppel to the prior finding that there was no conspiratorial rim and to the finding that there were no conspiratorial spokes except to the

allegations about Columbia's conspiracy with National Screen.

The opinion contains no explanation for the distinction it drew. On the one hand it says Columbia is entitled to collateral estoppel as to the "rim" aspect of the conspiracy (517 F.2d at 122) and on the other hand refused to apply collateral estoppel to the "spoke" aspect stating simply:

> "No judgment was ever entered in that litigation regarding the allegation that Columbia conspired with National Screen . . ." (*Id.* at 123).

That distinction is without foundation since summary judgment had been entered as to *all* allegations of conspiracy between National Screen and the Producers. It must necessarily rest, then, on the fact that Columbia was not a party and clearly is contrary to this Court's holding in *Blonder-Tongue*.

1. The Collateral Estoppel Effect of the Previous Judgment is the Same in Relation to all the Producers, Including Columbia

There is simply no basis for the distinction made by the Fifth Circuit between Columbia and the other Producers in respect to the collateral estoppel effect of the judgment in the 1961 suit. This is clear from an examination of the record in the 1961 suit as well as the opinion of the Court of Appeals itself.

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A.
The Complaint in the Previous Suit

Originally, none of the Producers was named as a defendant in the previous action. The amended complaint (Appendix pp. 26a-41a) alleged, however, that Columbia was one of the major Producers (complaint, ¶ 5); that prior to 1947 National Screen had entered into contracts with the eight major Producers (including Columbia) under which National Screen was given the exclusive right to manufacture and distribute posters (ibid, ¶8); that as a result of such contracts plaintiff was forced to obtain its supply of posters from National Screen (ibid); that since 1947 National Screen "has had nationwide and market area control over the manufacture and distribution of motion picture accessories in connection with motion picture films distributed by the major distributors herein named" (ibid, ¶10); and that National Screen "has been the only source from which plaintiff could obtain a sufficient quality of motion picture accessories to remain in business" (ibid).

Thus, it is clear that all the Producers (including Columbia) were charged with conspiring with National Screen to establish in National Screen a monopoly position in the production and distribution of motion picture advertising posters, and to confer upon National Screen the power to force plaintiff out of business.

Paragraph 8 of the amended complaint is especially significant. It reads as follows:

"Prior to 1947 and continuing in effect thereafter National Screen entered into separate contracts with Paramount, Fox, Columbia, Loews, RKO, Warners, United Artists and Universal pursuant to which National Screen was given exclusive rights on a nationwide basis to manufacture and distribute posters and other motion picture accessories advertising motion pictures distributed by or through each of said major distributors. Because of these exclusive contracts, plaintiff was forced to, and did, obtain its supply of posters from National Screen.

A. The above-mentioned exclusive contracts (the first of which were made in 1939-40) contained profit sharing provisions, and they were entered into pursuant to and in furtherance of a conspiratorial plan or scheme deliberately conceived and launched by the parties thereto for the purpose of creating a national monopoly of the business of distributing standard accessories."

Paragraph 8A. is the only allegation of conspiracy in the entire complaint. It accuses Columbia in exactly the same terms as the other Producers. Standing alone, it is sufficient to establish that the conspiracy alleged in the previous suit involved Columbia in exactly the same way as the other Producers.

B.
The Materials Filed in Opposition to the Producers Motion for Summary Judgment in the Previous Suit

In opposition to the Producers motion for summary judgment, plaintiff initially presented a brief and "Pretrial Statement Outlining Plaintiff's Principal Claims, Theories, and Contentions, and the Evidence which Plaintiff Will Seek to Introduce at the Trial to the Jury." (Appendix pp. 41a-65a) The pretrial statement is a detailed outline of plaintiff's complaint from 1939 forward with specific references to dates, individuals and litigation undertaken by various parties. The statement is replete with specific references to Columbia (pps. 9, 13, 15), as well as reference generally to the Producers as a group (pp. 3, 4, 10, 18, 21, 23-24). At no point do the charges against Columbia vary from those against the other Producers.

C.
The Opinion of the Fifth Circuit

The Fifth Circuit itself pointed to no distinction between the charges leveled against Columbia and those leveled against the other Producers in the previous suit, stating at 517 F.2d 119:

> "As amended, the complaint recited that each of the producers, including Columbia, had contracted with National Screen regarding the production and distribution of its accessories, and alleged that the arrangements 'were entered into pursuant to

> and in furtherance of a conspiratorial plan or scheme deliberately conceived and launched by the parties thereto for the purpose of creating a national monopoly of distributing standard accessories.' "

From the foregoing, it is beyond doubt that in the previous suit Columbia was charged by plaintiff in the same terms as the other Producers, and that all the Producers were charged with conspiracy among themselves and with National Screen to create a monopoly in the latter. Having once determined that Columbia was entitled to invoke the collateral estoppel effect of the previous judgment, the Fifth Circuit should have determined that Columbia was entitled to the same benefits from that judgment as the other Producers.

2. Separate Horizontal and Vertical Conspiracies Were Not Alleged in the Previous Suit.

The foregoing references to the record in the previous suit as well as the statement of the Fifth Circuit do more than demonstrate the absence of any difference between the charges directed at Columbia and the charges directed at the other Producers. They show clearly that the plaintiff did not divide its claim in the previous suit into separate horizontal and vertical conspiracies, and that the plaintiff alleged but one conspiracy, among all conspirators, to establish a monopoly in National Screen. This premise is confirmed by the order of the District Judge granting summary judgment resulting in dismissal of the com-

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plaint as to the Producers, *The Poster Exchange, Inc. v. National Screen Service Corp., et al.*, 35 FRD 558, 560 (USDC N.D. Ga. 1963), where the only statement relating to the nature of the conspiracy alleged is as follows:

> ". . . in the amended complaint filed by the plaintiff some two years after the filing of the original complaint, it is alleged that the movants have conspired with National Screen to monopolize the business of distributing standard motion picture accessories in the United States."

The previous judgment related as much to the vertical aspect as to the horizontal aspect of the conspiracy. This feature of the previous judgment was recognized by the Fifth Circuit in its determination that collateral estoppel was applicable as a bar to the entire claim against the Producers named as defendants in the previous suit, but inexplicably disregarded in its determination that the previous judgment was not available to Columbia as a bar to the claim that it had conspired with National Screen.

3. The Determination as to Columbia Creates a Manifest Injustice.

The holding of the Fifth Circuit against Columbia comprises but three sentences as follows:

> "We believe that the District Court did err, however, in holding that Poster's entire claim against Columbia was resolved by the

> collateral estoppel of the summary judgment for the producers in Poster's 1961 suit. No judgment was ever entered in that litigation regarding the allegation that Columbia conspired with National Screen for the purpose of establishing or augmenting National Screen's monopoly. Thus, we cannot agree that Poster is collaterally estopped from maintaining its claim in this suit that Columbia's relations with National Screen amount to a vertical Section 1 conspiracy."

This holding flies in the teeth of the *Blonder-Tongue* holding that lack of mutuality does not prevent the invocation of collateral estoppel by Columbia. In a *non-sequitur* the court seems to be saying that since Columbia did not benefit as a party from the previous judgment of no conspiracy, it can invoke the collateral estoppel effect of the previous judgment only partially. The Fifth Circuit here has simply reinstated the old mutuality requirement as to the claim against Columbia for conspiring with National Screen. If collateral estoppel is applicable, it obviously goes to all matters determined by the previous judgment, including the absence of conspiracy between Columbia and National Screen as well as between Columbia and the other Producers.

Because of this bizarre misapplication of the collateral estoppel doctrine, Columbia alone among all the Producers now faces a conspiracy trial of its relationship with National Screen, dating back to 1939. The contracts between Columbia and National Screen for the production and distribution of adver-

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tising accessories are alleged as the basis for the claimed conspiracy. Yet the judgment in the 1961 suit has already dismissed Poster Exchange's allegations that such contrfacts were in restraint of trade. Columbia, solely because it was a conspirator named but not sued in the 1961 action, must now disprove those allegations. This is a step backward in the increasing use of the collateral estoppel doctrine to prohibit a party from relitigating an issue decided against him in a prior action, which should not be countenanced in the current era of crowded trial dockets and overloaded courts.

CONCLUSION

For the foregoing reasons, Columbia prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

_____

Tench C. Coxe

_____

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for a Writ of Certiorari have been served on Francis T. Anderson, 829 St. Louis Street, New Orleans, Louisiana 70112; C. Ellis Henican, Jr., One Shell Square, Suite 4440, New Orleans, Louisiana 70139; and Glenn B. Hester, Commerce Building, Augusta, Georgia 30903, Counsel for The Poster Exchange, Inc., this ____ day of January, 1976.

_____

Tench C. Coxe

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APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1512

THE POSTER EXCHANGE, INC.,
Plaintiff-Appellant,

versus

NATIONAL SCREEN SERVICE CORPORATION, ET AL.,
Defendants,

COLUMBIA PICTURES CORP., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING

(SEPTEMBER 24, 1975)

Before TUTTLE, WISDOM and GOLDBERG, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Columbia Pictures Industries, Inc. in the above entitled and numbered cause be and the same is hereby DENIED.

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APPENDIX II

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE POSTER EXCHANGE, INC.

versus CA NO. 12497

NATIONAL SCREEN SERVICE CORPORATION, et al

ORDER

Motion for Summary Judgment

This is the progeny of *Poster VI*[1] and probably the progenitor of an opinion eventually to be written and designated *Poster VII*. The actors and plot in this serial of protracted litigation[2] have become so

---

1 Poster Exchange, Inc. v. National Screen Service Corporation, 456 F.2d 662 (5th Cir. 1972).

2 The history preceding Poster VI, supra n. 1, is as follows:
National Screen Service Corp. v. Poster Exchange, Inc. 305 F.2d 647 (5th Cir. 1962) [Poster I] affirming 198 F.Supp. 557 (N.D. Ga. 1961);
Poster Exchange, Inc. v. Paramount Film Dist. Co., 340 F.2d 320 (5th Cir. 1965), cert. den. 381 U.S. 936 [Poster II], affirming 35 F.R.D. 558 (N.D. Ga. 1963);
Poster Exchange, Inc. v. National Screen Service Corp., 362 F.2d 571 (5th Cir. 1966) [Poster III];
Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 421 F.2d 1313 (5th Cir. 1970), reh. den. 427 F.2d 710, cert. den. 400 U.S. 991 [Poster IV];
Poster Exchange, Inc. v. National Screen Service Corp., 431 F.2d 334 (5th Cir. 1970), cert. den. 401 U.S. 912 [Poster V].

familiar to all parties involved that little purpose would be served by a reiteration of the historical background underlying this action. However, to bring this order into its proper perspective a limited review of the present posture of this particular suit is in order.

This action commenced on February 26, 1969 with the filing of a complaint for treble damages for alleged violations of the Sherman Act, 15 U.S.C. §§1 and 2. Named as defendants were certain motion picture producers and distributors [hereinafter referred to collectively as "distributors")[3] and their sole licensee to produce and distribute advertising accessories for their motion pictures, National Screen Service Corporation (hereinafter referred to as "National Screen"). The thrust of the plaintiff's claim against these defendants is that they are jointly engaged in a continuing conspiracy to restrain trade in and monopolize the motion picture advertising accessory business. In this regard, the plaintiff, itself, has characterized its present action as "in effect, a continuation of Civil Action No. 7665." (See Plaintiff's "Motion for Entry of a Preliminary Injunction and Rule to Show Cause", ¶1).

Civil Action No. 7665 was originally filed in this court by the same plaintiff in 1961 naming only National Screen as a defendant. Subsequently, in 1963, the plaintiff filed an amended complaint alleging a conspiracy to violate the antitrust laws and adding as

3 Originally Columbia Pictures Corp., Loew's Incorporated, Metro Goldwyn Mayer, Inc., Paramount Film Distributing Corporation, Twentieth Century Fox Film Corp., United Artists Corp., Universal Film Exchanges, Inc. and Warner Bros. Pictures Distributing Corp., although Loew's Incorporated and Universal Film Exchanges, Inc. are no longer named defendants.

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defendants five of the six distributors presently named in the instant suit.[4] Shortly thereafter, the court granted a motion for summary judgment in favor of the distributor defendants upon determining that the facts presented were insufficient to establish the alleged conspiracy. *Poster Exchange, Inc. v. National Screen Service Corporation*, 35 F.R.D. 558 (N.D. Ga. 1963). That decision was affirmed *per curiam* by the Fifth Circuit United States Court of Appeals in *Poster II*. Civil Action No. 7665 eventually proceeded to judgment against the only remaining defendant, National Screen, which was found to have individually acted in violation of §2 of the Sherman Act, 15 U.S.C. §2. The order of the court dated February 17, 1969, nine days before the initiation of the present suit, was subsequently affirmed as to liability by the Court of Appeals in *Poster V*.

The distributor defendants in this case moved for summary judgment on the grounds that the claim is barred as to all defendants by operation of the statute of limitations set forth in 15 U.S.C. §15 b and that it is also foreclosed as against the distributors by application of *res judicata* and collateral estoppel, based upon the prior disposition of the conspiracy claim in Civil Action No. 7665. This court granted summary judgment in favor of the distributors relying specifically upon the ground that the action was barred by the four year statute of limitations. *Poster Exchange Inc. v. National Screen Service Corp.*, 306 F.Supp. 491 (N.D. Ga. 1969). The court further implied that a similar result could be reached by applying the doctrine of *res*

4 Columbia Pictures Industries, Inc. was not named as a defendant in Civil Action No. 7665.

judicata. The effect of the principle of collateral estoppel in this context was not reached in granting this summary judgment. Accordingly, the action was dismissed and the judgment made final as to the distributor defendants by order dated November 11, 1969.

While continuing to press its suit against the only remaining defendant, National Screen, the plaintiff also appealed this court's grant of summary judgment in favor of the distributors. It is the Fifth Circuit's disposition of that appeal in *Poster VI* which necessitated this order.

Chief Judge Brown, writing for the Fifth Circuit Court of Appeals in *Poster VI*, vacated the summary judgment and remanded the case to this court for further action consistent with the opinion rendered by the circuit court. That court rejected *res judicata* as a viable basis for the summary judgment in favor of all distributor defendants. It proceeded to focus on the question of the applicability of collateral estoppel, which had not previously been explored by this court, and the propriety of this court's determination of the statute of limitations defense. In outlining a proposed analytical approach to the issues involved, the court stated, first, with respect to the collateral estoppel defense:

> Whatever issues the [district] Court, on examination of the 1963 suit record, finds necessarily to have been resolved [in Civil Action No. 7665, 35 F.R.D. 558 (N.D. Ga. 1963), affirmed in *Poster II*] — rightly or wrongly — are

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> no longer open to litigation. As to them, the bar is complete quite apart from the statute of limitations.

Poster VI, 456 F.2d at 666. On the statute of limitations issue, it continued:

> But the statute of limitations problem is present with respect to (i) pre-1961 conduct (or nonaction) not foreclosed by collateral estoppel and (ii) post-1961 conduct occurring more than four years prior to the 1969 suit (No. 12497).

Ibid. Regarding the latter possibility, the Court of Appeals discussed the recent Supreme Court decision, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), and concluded that:

> With respect to post-1961 actions which substantively are not foreclosed by the 1963 summary judgment, Poster may recover damages for all such acts which occurred within four years of the 1969 suit. As to such acts occurring prior to 1965, it can recover for such damages as could not reasonably have been proved prior to February 26, 1965. This could conceivably include damages for acts occurring pre-1961 without establishing independent post-1961 acts as a cause.

Ibid, 456 F.2d at 667-68. Judge Brown finally suggested that the court appoint a special master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, "for an

orderly determination of just what remains to be disposed of by summary judgment on the basis of the facts, not just pleadings, or by trial." *Ibid* at 668.

Thus, by order of reference dated September 28, 1972, a Special Master was appointed to inquire into these matters and to prepare a report containing proposed findings of fact and conclusions of law. That report was filed on July 30, 1973 and the plaintiff subsequently filed objections to certain of the legal and factual conclusions contained therein.

In substance, the conclusions reached by the Master in his report are that:

(1) The plaintiff's action against the distributor defendants, including Columbia Pictures Corporation, is barred by the doctrine of collateral estoppel growing out of the summary judgment granted in the earlier litigation among these parties;

(2) The plaintiff's action against all the defendants is also barred by the statute of limitations set forth in 15 U.S.C. §15 b: and

(3) The exception to the four year statute of limitations created by *Zenith Radio Corp., supra*, is inapplicable to this case.

Upon careful consideration of the findings and conclusions of the Special Master's report, it is approved in its entirety and is hereby incorporated in this order by reference. The plaintiff's objections to both factual and legal conclusions are rejected and overruled.

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However, in light of the demonstrated contentiousness of counsel for the parties involved, it would not be overly cautious to elaborate further on the plaintiff's specific objections.

Looking first to the objections to the findings of fact, the court agrees with the Master's Finding No. 1 that the allegations of violations of the antitrust laws charged in the present complaint are "identical in substance" to those in the amended complaint in the earlier Civil Action No. 7665. The same incidents and occurrences are asserted in both complaints as the crux of the plaintiff's claim, with the present suit simply contending that the status of all parties has remained unchanged in the interim since the initial acts were committed. Also, the plaintiff, in objecting to Finding No. 8, denies that "evidence" was submitted by the distributor defendants in support of their motion for summary judgment in Civil Action No. 7665. However, this argument is clearly refuted by the record in that case which shows that that motion was expressly based upon certain designated answers to interrogatories, admissions and depositions, not to mention the admission in open court by counsel for the plaintiff that the evidence there relied on to establish the alleged conspiracy was the same as that presented in *Lawlor v. National Screen Service Corp.*, 270 F.2d 146 (3rd Cir. 1959); *cert. den.* 362 U.S. 922.

By its objections to the Master's conclusions of law, the plaintiff persists in its belief that because the prior adverse ruling on the issue of conspiracy by the defendant distributors was rendered by summary judgment, it cannot be accorded collateral estoppel effect.

Clearly, collateral estoppel cannot apply in a subsequent action to questions of fact not put in issue by the pleadings and actually submitted to a jury or other trier of facts in a previous suit. *Cromwell v. County of Sac*, 94 U.S. 351 (1877); *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 421 F.2d 1313 (5th Cir. 1970) (*Poster IV*). Thus, default judgments, consent judgments or judgments on stipulation generally cannot determine questions so as to preclude subsequent relitigation of the same issues. *E.g., Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); 1B Moore's *Federal Practice*, ¶ 0.444[1] (1965). The plaintiff, however, goes further to argue that a summary judgment, necessarily based upon a finding by the court that there is no genuine issue of fact involved, is not a factual determination for the purpose of collateral estoppel. That proposition has been specifically rejected by the Fifth Circuit in the earlier stages of the present series of litigation. In *Poster IV*, the court stated:

> We reject out of hand the beguiling but superficial contention of Exhibitors that neither Suit No. 1 nor No. 2 can have any collateral estoppel effect because no summary judgment can have such effect. This is based on an overemphasis of two assertions: (1) a collateral estoppel results only from an actual decision of an issue and (2) a summary judgment results from a finding that there is no genuine issue as to any material fact.
>
> It would be strange indeed if a summary judgment could not have collateral estoppel effect.

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> This would reduce the utility of this modern device to zero. It would compel the useless ritual of a formal trial to get the equivalent ruling at the end of the evidence — plaintiff's, defendant's, or all — of a directed verdict. Indeed, a more positive adjudication is hard to imagine.

Poster IV, 421 F.2d at 1319. This ame view is also implicit in the directive of the Fifth Circuit in *Poster VI* to this court to determine what issues were decided by the previous summary judgment. *A fortiorari*, that initial summary judgment in Civil Action No. 7665 required a judicial determination that, as a matter of fact, the defendants were not engaged in the alleged conspiracy.

The plaintiff's other objection challenges the Master's application of 15 U.S.C. §15 b which specifies that civil antitrust actions must be "commenced within four years after the cause of action accrued." The plaintiff contends that the conduct of the defendants is in the nature of a continuing conspiracy to violate the antitrust laws with a new cause of action accruing every successive day. Accordingly, it urges that a new limitation period commences to run each day so long as the defendant National Screen continues to refuse to sell advertising accessories to the plaintiff. Carried to its logical extreme, this would mean that the plaintiff would be able to bring successive actions *ad infinitum* based upon the May, 1961 refusal by National Screen to deal with the Plaintiff. This proposition cannot be sustained either as a matter of law or logic.

The Supreme Court's decision in *Zenith Radio Corp., supra*, fails to fully resolve the question of when a cause of action has "accrued" in relation to the statute of limitations. First of all, that case dealt generally with the "context of a continuing conspiracy to violate the antitrust laws." *Ibid* at 338. More specifically, the issue there concerned the lawfulness of the continuing, collusive operation of foreign patent pools which effectively excluded that plaintiff from certain segments of the market. In the present case, however, the plaintiff continues to overlook the prior adjudication that the distributor defendants have not been engaged in an unlawful conspiracy, continuing or otherwise. Obviously, this leaves only National Screen, the sole authorized producer and distributor of motion picture advertising accessories, as a defendant in this action.

Furthermore, the only overt acts attributable to the defendants were prior to and culminated with the 1961 termination of the plaintiff's supply of advertising accessories when National Screen decided to vertically integrate the accessory distribution business. In applying the statute of limitations, it is necessary to distinguish between an act which itself confers a cause of action under the antitrust laws and the damages which may accrue as a result of that act. Here, although the plaintiff alleges that its business continues to be damaged because of its inability to obtain advertising accessories, there have not been any additional overt acts by the defendants since the original refusal by National Screen to supply accessories.

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Zenith Radio Corp., supra, repeats the general rule that the statute of limitations commences to run upon the commission of an "act" which is violative of the antitrust laws and which causes injury to the plaintiff's business. However, it does not address the problem now confronting the court concerning identification of the "act" constituting the cause of action. Examination of relevant judicial authority leads to the inescapable conclusion that this case can only fit within the classic "refusal to deal" mold. The characteristics of these cases were recently summed up by the Fifth Circuit Court of Appeals that:

> Each . . . involved the termination of a course of dealing whereby the defendant supplier or manufacturer regularly furnished a distributor or dealer with a certain continuously available product for resale and where any subsequent refusal was merely a reiteration of the previous termination, in no way altering what had already been done.

Braun v. Berenson, 432 F.2d 538 (5th Cir. 1970). See also *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 197 F.Supp. 333 (N.D. Ala. 1960), *aff'd*, 295 F.2d 362 (5th Cir. 1961); *Emich Motors Corp. v. General Motors Corp.*, 229 F.2d 714 (7th Cir. 1956); *Garelick v. Goerlich's Inc.*, 323 F.2d 854 (6th Cir. 1963); *cf. Crummer Co. v. DuPont*, 223 F.2d 238 (5th Cir. 1955). In such a situation, the cause of action accrues with the single initial act of terminating a source of supply. Adherence to this once announced refusal to deal or subsequent refusals which merely reiterate the initial denial do not comprise new causes of action

regardless of the fact that damages may continue to be incurred over a long period of time after the original termination. *Southeastern Hose, Inc. v. Imperial-Eastman Corp.*, ___ F.Supp. ___, Civil Action No. 12,-608 (N.D. Ga. April 2, 1973).

Finally, the court's role in implementing the apparent mandate of the Fifth Circuit and the recommendations of the Special Master is subject to certain procedural limitations. Although the conclusions of the Special Master concerning the collateral estoppel question relate only to the distributor defendants, the finding pertaining to the application of the statute of limitations are not so confined. Indeed, as initially presented in the motion for summary judgment by the distributors and as subsequently discussed by both this court and the appeals court, the statute of limitations question implicitly involved all the named defendants in the case. However, notwithstanding the potentially broader reach of these deductions, the court is at this time constrained to act only within the scope of the motion for summary judgment by the distributor defendants originally filed on April 26, 1969 and subsequently remanded by the Fifth Circuit in *Poster VI* upon vacation of this court's original determination. Consequently, the conclusions of the Special Master will be applied here only as they affect the distributor defendants.

Accordingly, the motion for summary judgment filed on April 26, 1969 by the distributor defendants is granted.

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Motion by Plaintiff for Reconsideration and Modification of the Order of Court Dated August 6, 1973

The plaintiff charges that the Special Master "misunderstood" the purpose of his appointment, failed to familiarize himself with the facts of this case and exhibited "animosity" toward the plaintiff in his report. To the contrary, however, the court finds that the Special Master has commendably and comprehensively performed the task delegated to him by the order of reference. Moreover, the Master's report is well supported in both fact and law and its conclusions demonstrate no preference or bias toward any party to this suit.

Furthermore, the court finds nothing inequitable in assessing a $500.00 payment from the plaintiff and a similar amount from the defendants collectively for final payment of the Special Master's fee. Throughout the Special Master proceeding, the expenses have been divided in this manner without objection. Only now, after an unfavorable disposition, does the plaintifff complain. The motion to reconsider and modify is therefore denied. So ordered this the 12th day of December, 1973.

/s/ ALBERT J. HENDERSON, JR.
Judge, United States
District Court for the
Northern District of Georgia

JUDGMENT

(Filed: December 27, 1973)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE POSTER EXCHANGE, INC.

versus CA No. 12497

NATIONAL SCREEN SERVICE CORPORATION, et al

This action came on for consideration before the Court, Honorable Albert J. Henderson, Jr., United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, on December 12, 1973 granting summary judgment in favor of the distributor defendants,

It is Ordered and Adjudged that the plaintiff take nothing, and that the defendants, COLUMBIA PICTURES CORPORATION, METRO GOLDWYN MAYER, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, TWENTIETH CENTURY FOX FILM CORPORATION, UNITED ARTISTS CORPORATION and WARNER BROS. PICTURES DISTRIBUTING CORPORATION, recover of the plaintiff THE POSTER EXCHANGE, INC., their costs of action.

Dated at Atlanta, Georgia this 27th day of December, 1973.

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BEN H. CARTER
Clerk of Court

/s/ PEGGY L. EDMUNDS
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE POSTER EXCHANGE, INC.

versus CA No. 12497

NATIONAL SCREEN SERVICE CORPORATION, et al

ORDER

The order of this court in the above styled case dated December 12, 1973 is hereby amended by adding the following paragraph at the end thereof:

> It appears that there is no just reason for delay in making the summary judgment for the motion picture distributors final. Therefore, the clerk of the court is directed to enter final judgment in accordance with the grant of summary judgment in favor of the distributor defendants.

So ordered this the 26th day of December, 1973.

/s/ ALBERT J. HENDERSON, JR.
Judge, United States
District Court for the
Northern District of Georgia

APPENDIX III

SUPREME COURT OF THE UNITED STATES

No. A-548

COLUMBIA PICTURES INDUSTRIES,
Petitioner

versus

THE POSTER EXCHANGE INC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and incluidng January 19, 1976.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 18 day of December, 1975.

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APPENDIX IV

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. Sections 1 and 2:

Section 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with Foreign nations, is declared to be illegal . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade of commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sections 4 and 16 of the Clayton Act, 28 Stat. 731 and 737, 15 U.S.C. Sections 15 and 26.

Section 4.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

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APPENDIX V

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 74-1512

THE POSTER EXCHANGE, INC.,
Plaintiff-Appellant,

versus

NATIONAL SCREEN SERVICE CORPORATION, et al.,
Defendants,

COLUMBIA PICTURES INDUSTRIES, INC., et al.,
Defendants-Appellees.

PETITION FOR REHEARING

Tench C. Coxe,
Attorney for Petitioner,
Columbia Pictures Industries, Inc.

1400 Candler Building
Atlanta, Georgia 30303

PETITION FOR REHEARING

COLUMBIA PICTURES INDUSTRIES, INC. (Columbia) petitions for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure for the reason that the Court, in holding that the estoppel created by the former judgment does not cover Poster's claim against Columbia for conspiring with National Screen Service Corporation (National Screen), overlooked the fact that Columbia, like the other Producers, was alleged to have participated with National Screen in the conspiracy charged in the previous suit.

I.

This Honorable Court has quite correctly held that Columbia is entitled to the collateral estoppel effect of the judgment in the 1961 suit. But this Court has incorrectly limited the application of the estoppel to Poster's claim against Columbia for conspiring with other Producers and has incorrectly, in our opinion, held that the estoppel does not cover Poster's claim against Columbia for conspiring with National Screen. The Court has overlooked the fact that in the 1961 suit not only the other Producers but also National Screen was alleged to have conspired with Columbia. The summary judgment dismissing the plaintiff in the 1961 suit thus not only by necessity determined that upon the facts shown none of the Producers had conspired unlawfully with Columbia, but also necessarily determined that National Screen had not conspired unlawfully with Columbia.

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This Court recognized (Slip Opinion, p. 7069) that in the 1961 suit there was but one conspiracy charged, based upon the alleged common design to create a monopoly in National Screen:

> "As amended, the complaint recited that each of the Producers, including Columbia, had contracted with National Screen regarding the production and distribution of its accessories, and alleged that the arrangements 'were entered into pursuant to and in furtherance of a conspiratorial plan or scheme deliberately conceived and launched by the parties thereto for the purpose of creating a national monopoly of distributing standard accessories.' "

As part and parcel of the alleged conspiracy, Poster in the 1961 suit relied upon an alleged exclusive dealing contract between Columbia and National Screen, stating in paragraph 8 of its Complaint:

> "Prior to 1947 and continuing in effect thereafter National Screen entered into separate contracts with Paramount, Fox, *Columbia*, Loews, RKO, Warners, United Artists and Universal pursuant to which National Screen was given exclusive rights on a nationwide basis to manufacture and distribute posters and other motion picture accessories advertising motion pictures distributed by or through each of said major distributors . . ."

Thus Poster in the 1961 suit clearly complained of an alleged conspiratorial relationship between Columbia and National Screen, alleging that Columbia was guilty of the same type of misconduct with National Screen as the other Producers.

II.

This Court infers that Columbia has not sought to impose the collateral estoppel effect of the 1961 suit upon Poster's claim for conspiracy with National Screen, stating (Slip Opinion, p. 7072):

> "Columbia seeks here by that judgment to estop Poster from proceeding on its allegations that Columbia illegally conspired *with the remaining Producers.*" (Emphasis supplied)

The fact is that Columbia has sought a much broader application of collateral estoppel, extending to its allegedly conspiratorial relations with *all* the parties in the previous suit, including National Screen.

III.

With respect to its limitation on the collateral estoppel effect of the 1961 action to Columbia's relations with the other Producers, this Court said (Slip Opinion, p. 7073):

> "No judgment was ever entered in that litigation regarding the allegation that Columbia conspired with National Screen for the purpose of establishing or augmenting National Screen's monopoly."

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This statement does not support the Court's ambivalence in applying collateral estoppel benefits. There was no specific judgment in so many words in the 1961 action in respect of Columbia's alleged conspiracy with the Producer defendants, yet this Court finds "no difficulty" in applying collateral estoppel to Poster's claim against Columbia for conspiring with them. That judgment dismissed all of Poster's allegations among which, as noted in Part I, *supra*, was the allegation in paragraph 8 of the Complaint that "National Screen entered into separate contracts with . . . Columbia". Those contracts are the foundations of both the 1961 and the instant suits.

IV.

There can be no reason to believe that the judgment in the 1961 suit was not intended to apply to the alleged conspiratorial relations between the Producer defendants and National Screen. In the Complaint in that suit Columbia was accused as a conspirator of the same type of misconduct with National Screen as the other Producers. Therefore, Columbia, like the other Producers, is entitled to the collateral estoppel effect of the 1961 suit barring any allegation as to its alleged conspiratorial conduct with National Screen. It is respectfully requested that a rehearing be granted and that the judgment below as to Columbia be affirmed.

Respectfully submitted,

/s/ TENCH C. COXE
Tench C. Coxe, Attorney for Petitioner, Columbia Pictures Industries, Inc.

1400 Candler Building
Atlanta, Georgia 30303
Telephone 404-522-7480

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing Petition for Rehearing of this cause as it relates to Appellee Columbia Pictures Industries, Inc. is presented in good faith and not for purposes of delay.

This 19th day of August, 1975.

/s/ TENCH C. COXE
Tench C. Coxe, Attorney for Petitioner, Columbia Pictures Industries, Inc.

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APPENDIX VI

COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE POSTER EXCHANGE, INC.

versus CA NO. 7665

NATIONAL SCREEN SERVICE CORPORATION, PARAMOUNT FILM DISTRIBUTING CORPORATION, METRO-GOLDWYN-MAYER, INC. (formerly LOEW'S, INC.), TWENTIETH CENTURY FOX FILM CORPORATION, UNITED ARTISTS CORPORATION and WARNER BROS. PICTURES DISTRIBUTING CORPORATION

1.

The cause of action asserted herein arises under the antitrust laws of the United States of America, and more particularly under the Act of July 2, 1890, c. 647, 26 Stat. 209, Sections 1 and 2 (15 USC §1, 2), said act being commonly referred to as the Sherman Act. Jurisdiction is conferred upon this Court by Section 7 of the Sherman Act (26 Stat. 210, 28 Stat. 570), and by Sections 4, 12 and 16 of the Act of October 13, 1914, c. 323 38 Stat. 730 (15 U.S.C. §§ 15, 22 and 26), said act being commonly referred to as the Clayton Act.

2.

The plaintiff herein is a corporation organized and existing under the laws of the State of Georgia with its offices and principal place of doing business in the City of Atlanta, Fulton County, Georgia. For many years, as hereinafter alleged, the plaintiff has been engaged in the business of renting and selling motion picture accessories as hereinafter defined to motion picture exhibitors in the Atlanta area and in numerous cities throughout the States of Alabama, Georgia, Florida, and Tennessee.

3.

The defendant National Screen Service Corporation is a corporation organized and existing under the laws of the State of Delaware. Said defendant is transacting and doing business within the State of Georgia and within the Northern District of Georgia, and has designated as its agent for service of process Mr. W. Charles Le Shanna, Healey Building, Atlanta, Fulton County, Georgia. For many years as hereinafter alleged, the defendant National Screen Service Corporation has been engaged in the business of manufacturing motion picture accessories, and distributing said accessories upon a rental or sales basis to Poster Exchanges, including plaintiff, and to motion picture exhibitors throughout the various states including the States of Alabama, Georgia, Florida and Tennessee. Defendants Paramount Film Distributing Corporation, Metro-Goldwyn-Mayer, Inc., Twentieth Century Fox Film Corporation, United Artists Corporation and Warner Bros. Pictures Distributing Corporation are

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all foreign corporations transacting and doing business within the State of Georgia and within the Northern District of Georgia with agents within this district upon whom service may be had.

4.

The plaintiff and the defendant are engaged in interstate commerce, and the acts and practices of the defendant herein alleged have had and are having a direct and substantial effect upon said commerce.

5.

As used in this complaint:

(a) "Motion picture accessories" mean advertising materials including advertising posters used by motion picture theatres in connection with the exhibition of motion picture films. The term includes what is commonly referred to in the trade as "standard accessories" and "special accessories" including lithograph posters (in 1 sheet, 3 sheet, 6 sheet and 24 sheet sizes) 8 x 10 stills, photos [in size 11 x 14 (in sets) 22 x 28 and 14 x 36], window cards, slides, heralds, mats, 40 x 60's, 30 x 40's, 24 x 82, banners, 24 x 60 banners, 40 x 60 Hollywood displays, 40 x 60 specials, 40 x 60 transparencies, 30 x 40 specials, 8 x 10 title cards, 11 x 14 title cards, 24 x 24 title cards, standees and any other similar materials.

(b) "Motion picture distributors" mean the major distributors of feature length motion picture films to exhibitors within the United States and includes

Paramount Film Distributing Corporation, Columbia Pictures Corporation, Loews, Inc. (subsequently Metro-Goldwyn-Mayer, Inc.), Twentieth Century Fox Distributing Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Warner Bros. Pictures Distributing Corporation, and Buena Vista Distribution Co., Inc. Historically said major distributors included RKO Radio Pictures, Inc., but RKO has ceased to do business. Said motion picture distributors will be hereinafter referred to as Paramount, Columbia, Loews, Fox, United Artists, Universal, Warners, Buena Vista and RKO, the names by which each company is commonly known in the motion picture business.

(c) "Market area" means the numerous cities throughout the four state area of Alabama, Georgia, Florida, and Tennessee within which plaintiff rents and sells accessories to exhibitors. Said cities include but are not limited to the cities of Atlanta, Georgia, Jacksonville, Florida, Miami, Florida, Tampa, Florida, Orlando, Florida, Montgomery, Alabama, Birmingham, Alabama, Selma, Alabama, Ozark, Alabama, Nashville, Tennessee, Chattanooga, Tennessee, and Knoxville, Tennessee.

(d) "Exhibitor" means any person engaged in operation of motion picture theatre or theatres.

(e) "National Screen" means and refers to the defendant herein National Screen Service Corporation.

(f) A "manufacturer" of standard accessories means and includes a person who procures standard

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accessories by engaging other persons to produce, or to reproduce the standard accessories.

6.

The plaintiff herein commenced business in May of 1941. At the commencement of its business motion picture accessories were available to plaintiff through the Atlanta exchange of the named distributors of motion pictures and plaintiff was able to and did purchase substantial quantities of motion picture accessories direct from the distributors. Upon purchasing said accessories plaintiff would sell or rent said accessories to motion picture exhibitors located in cities throughout the States of Alabama, Georgia, Florida, and Tennessee.

7.

Since at least as early as 1947 National Screen has been the only concern in the United States licensed by said major motion picture distributors to manufacture and distribute advertising accessories with regard to motion pictures distributed by or through said major distributors.

8.

Prior to 1947 and continuing in effect thereafter National Screen entered into separate contracts with Paramount, Fox, Columbia, Loews, RKO, Warners, United Artists and Universal pursuant to which National Screen was given exclusive rights on a nationwide basis to manufacture and distribute

posters and other motion picture accessories advertising motion pictures distributed by or through each of said major distributors. Because of these exclusive contracts plaintiff was forced to, and did, obtain its supply of posters from National Screen.

A. The abovementioned exclusive contracts (the first of which were made in 1939-40) contained profit-sharing provisions, and they were entered into pursuant to and in furtherance of a conspiratorial plan or scheme deliberately conceived and launched by the parties thereto for the purposes of creating a national monopoly of the business of distributing standard accessories.

9.

Since the year 1947 and up until May 16, 1961, plaintiff herein purchased and continued to purchase substantial quantities of motion pictures accessories from defendant National Screen and plaintiff sold or leased said posters in interstate commerce to motion picture exhibitors located in cities throughout Alabama, Georgia, Florida, and Tennessee.

10.

Upon the granting of such exclusive license to National Screen each of said distributors no longer manufactured or distributed motion picture accessories and all accessories on motion pictures distributed by or through each of these distributors had to be obtained from National Screen. With the exception of Columbia which now manufactures and dis-

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tributes its own accessories in connection with pictures distributed by it, and with the exception of RKO now out of business, all remaining major distributors hereinbefore named do not now manufacture or distribute accessories on pictures distributed by them, and consequently said major distributors can not and do not furnish motion picture accessories to any person save by and through National Screen. Since at least as early as 1947 and continuing thereafter National Screen has had nationwide and market area control over the manufacture and distribution of motion picture accessories created in connection with motion picture films distributed by the major distributors hereinbefore named. Since 1947 National Screen has been the only source from which the plaintiff could obtain a sufficient quantity of motion picture accessories to remain in business all on account of facts hereinabove set forth. At all times involved in this complaint, however, said motion picture distributors have had full control over the designing of and the means and quality of reproduction of all standard accessories, and have always been and still are the copyright owners of all of said standard accessories.

11.

Plaintiff alleges on information and belief that by the end of 1957 National Screen had ceased to have exclusive contract rights with the major distributors regarding the manufacture and distribution of motion picture accessories on pictures distributed by said major distributors. However, since 1957 National Screen has continued to be the sole manufacturer of

motion picture accessories created with regard to pictures distributed by or through said major distributors with the exceptions hereinbefore noted and has continued to be the only source in the market area from which plaintiff can obtain motion picture accessories on motion pictures distributed by or through said major distributors. Distribution of motion picture accessories to exhibitors in the market area since 1957 as well as prior thereto has been made either direct by National Screen or by plaintiff utilizing accessories purchased from National Screen. National Screen directly supplies exhibitors in the market area with eighty to eighty-five percent of their motion picture accessory needs and plaintiff supplies the remaining fifteen to twenty per cent. This disparity in the relative volume of business transacted is attributable to defendants' unlawful monopoly power in general and to numerous unfair, oppressive and predatory business practices employed by the defendants.

12.

From and after the commencement of business by plaintiff in May of 1941 the plaintiff has been in competition with National Screen in the renting and distributing of motion picture accessories to exhibitors in cities throughout the States of Alabama, Georgia, Florida, and Tennessee. While National Screen has for many years and still continues to directly supply by far the greater number of exhibitors in said market area as aforesaid, the plaintiff has been successful in developing a substantial accessories rental business in this area in competition with and at the expense of

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the complete control which would otherwise be enjoyed by National Screen in the distribution and rental of said motion pictures accessories to exhibitors.

13.

Motion picture exhibitors in the market area in which plaintiff does business either obtained their motion picture accessories on pictures distributed by or through said major distributors direct from National Screen or obtained said accessories from plaintiff. In all the cities in said states in which plaintiff does business the plaintiff is and has been for many years the sole concern in competition with National Screen in the renting of motion picture accessories to said exhibitors.

14.

National Screen has had at least since 1947 and continuing thereafter control over the distribution of all motion picture accessories of said major distributors in the market area. National Screen has since 1947 determined the quantity of said accessories available to plaintiff, the prices to be charged to plaintiff therefore, and the conditions and terms upon which said accessories are or will be made available to plaintiff.

15.

On or about February 15, 1961, plaintiff was notified by National Screen by letter of its refusal from and after May 16, 1961, to do further business with plaintiff. Said refusal to deal was part of a nation-wide program instituted by National Screen and affected not only plaintiff but other similarly situated poster exchanges throughout the United States. This action was taken by National Screen Service Corporation with knowledge, acquiescence and approval on the part of the above-named motion picture distributor defendants, and was in furtherance of the aforesaid conspiracy of defendants to monopolize the business of distributing standard accessories on a national scale.

16.

Since May 16, 1961 National Screen has in fact pursued said announced policy of refusing to deal with plaintiff. In spite of requests by plaintiff to be allowed to purchase motion picture accessories from National Screen as in the past, National Screen has been and is refusing to deal with plaintiff, and as a result plaintiff has been unable since May 16, 1961, to obtain motion picture accessories on films distributed by or through the major distributors hereinbefore named. While plaintiff has been able to obtain motion picture accessories on pictures distributed by Columbia, who now manufacture and distribute accessories with regard to Columbia pictures, and while a few motion picture accessories are available in connection with pictures distributed by or through minor independent distributors who manufacture and distribute their

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own accessories, the bulk of plaintiff's business and plaintiff's survival as a competitor of National Screen in the market area is dependent upon its being able to supply its exhibitor customers with motion picture accessories with regard to pictures distributed by or through said major distributors. As hereinbefore alleged such accessories are available only through National Screen.

17.

Plaintiff alleges that said refusal to deal by National Screen had for its intent and purpose the elimination of existing competition between National Screen and the plaintiff in the numerous cities throughout Alabama, Georgia, Florida, and Tennessee in which plaintiff and National Screen compete in the renting of motion picture accessories to exhibitors. Plaintiff further alleges that said refusal to deal by National Screen had for its further intent and purposes the monopolizing in interstate commerce and within the market area of the distribution of motion picture accessories created with regard to motion pictures distributed by or through said major distributors.

18.

Said refusal to deal by National Screen is having and will have the effect of eliminating plaintiff as a competitor of National Screen in the distribution of motion picture accessories in the market area and will have the further effect as was intended of maintaining and extending the existing monopoly of National Screen in the distribution of motion picture

accessories of the aforenamed distributors throughout the market area.

19.

With the elimination of plaintiff as a competitor all exhibitors in the market area who desire to rent motion picture accessories with regard to films distributed by or through the major distributors hereinabove named will have as their only source of supply, National Screen, and the competition in the distribution of said accessories formerly existing for their business and as between National Screen and the plaintiff will have been destroyed and National Screen's sole competitor in said market area will have been eliminated all to the injury of the general public as well as the plaintiff.

20.

As a result of said refusal to deal and by means thereof National Screen is utilizing its dominant market position in the manufacture and distribution of motion picture accessories distributed by or through said major distributors to exclude competition and the defendant National Screen is thereby monopolizing and attempting to monopolize the distribution in interstate commerce of motion picture accessories created with regard to motion pictures distributed by or through the major distributors hereinbefore named all in violation of the antitrust laws of the United States.

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21.

Unless National Screen is immediately and forthwith restrained from said unlawful refusal to deal, the plaintiff will be forced out of business to the loss and injury of plaintiff and to the injury of the general public.

22.

As a result of said unlawful refusal to deal under the facts and circumstances hereinbefore alleged plaintiff has since May 16, 1961, been unable to obtain motion picture accessories distributed exclusively by National Screen and formerly available to it over a period of some fifteen years. As a result plaintiff has had and is having to reject numerous orders placed with it by its exhibitor customers located in cities throughout the States of Alabama, Georgia, Florida and Tennessee. Plaintiff has had to instruct its customers as to its inability to supply said accessories and has had to instruct its customers that said accessories can be obtained only through National Screen. Because of National Screen's refusal to deal as aforesaid, plaintiff is suffering immediate and irreparable injury to its trade or business.

23.

Plaintiff has already suffered substantial damages as a result of said refusal to deal including loss of profits and the loss of good will built up in connection with said business over a period of twenty years. Unless National Screen is immediately restrained, plain-

tiff will suffer further irreparable injury to its property and business and will be forced out of business.

24.

The amount of damages suffered by plaintiff can not be estimated with reasonable accuracy at this time, but if National Screen is not enjoined from said unlawful refusal to deal, plaintiff believes and so alleges that it will be damaged far in excess of $100,000.00.

Wherefore, plaintiff prays:

(a) That preliminary injunction shall issue herein after due notice of this application therefor and that defendant be ordered on a day fixed to show cause why said preliminary injunction should not be granted;

(b) That the Court upon the final hearing of this case adjudge and decree:

1. That the defendant, National Screen Service Corporation, is monopolizing or attempting to monopolize the distribution of motion picture accessories in interstate commerce in the manner and by the means hereinabove described and that said defendant, its agents, representatives and employees be permanently enjoined from further engaging in or carrying out said refusal to deal with the plaintiff; and
2. That defendants herein have conspired to monopolize and have actually monopolized the business of distributing standard

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accessories throughout the United States in the manner and by the means hereinabove described, and that defendants be permanently enjoined from continuing in said conspiracy.

(c) That plaintiff have judgment against the defendant for the sum of $300,000.00, treble damages, as provided by the Clayton Amendment to the Sherman Antitrust Act or for such sum as shall appear from all the evidence adduced at the trial to be just and lawful;

(d) That plaintiff recover reasonable attorney's fees and the costs and disbursements of this action.

/s/ FRANCIS T. ANDERSON
Francis T. Anderson

2616 Girard Trust Building
Philadelphia 2, Pennsylvania

/s/ NOLAN B. HARMON
Nolan B. Harmon
Counsel for Petitioner

1113 C&S National Bank Building
Atlanta 3, Georgia

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the Amended Complaint on National Screen Service Corporation by mailing a copy to its counsel, Mr. Charles A. Moye, by depositing in the United States

Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 12th day of march, 1963.

/s/ NOLAN B. HARMON
NOLAN B. HARMON
Of Counsel for Plaintiff

APPENDIX VII

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE POSTER EXCHANGE, INC.,
Plaintiff,

versus CA No. 7665

NATIONAL SCREEN SERVICE CORPORATION, et al.
Defendants.

PLAINTIFF'S PRE-TRIAL STATEMENT OUTLINING PLAINTIFF'S PRINCIPAL CLAIMS, THEORIES, AND CONTENTIONS, AND THE EVIDENCE WHICH PLAINTIFF WILL SEEK TO INTRODUCE AT THE TRIAL TO THE JURY

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I
THE ORIGINAL POSTER RENTERS

Motion picture advertising posters, known as "standard accessories," are used by motion picture exhibitors to advertise the pictures being displayed at their theatres.

Prior to 1940, all standard accessories were made by producers of the pictures and were distributed on a national scale through the branch offices, or "exchanges," (numbering about thirty) which every major producer operated.

The exhibitor was required to pay a price — either a rental price or an outright sale price — for all the accessories he decided to use.

Prior to 1940, standard accessories were distributed also, but on a local scale, by independent operators known as "poster renters."

More fully, it was the practice for poster renters, acting independently, to buy, at regular prices, at the producers' exchanges, relatively large supplies of standard accessories for the pictures of all the major producers, and to rent the accessories, time and again, to successive exhibitors.

Many exhibitors preferred to deal with a poster renter because, by doing so, they could obtain their accessories from a single source, and at a relatively cheap rental price.

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II
LAUNCHING OF THE CONSPIRACY

Prior to 1940, National Screen Service Corporation (hereinafter "National Screen") was a large corporation engaged in the distribution, on a national scale, of motion picture trailers, (or "pre-vues") and of special kinds of posters known as specialty accessories, which were distinguishable from standard accessories principally by the fact that they were designed and produced by independent concerns rather than by the motion picture producers.

In the latter part of 1939 National Screen conceived and launched a plan, or scheme, to set itself up, with the aid and connivance of the motion picture producers, as the sole distributor of standard accessories, for the pictures of all the eight major producers, throughout the United States, thereby wiping out the existing businesses of the localized poster renters.

This plan called for the making of license agreements between National Screen and each producer, the principal features of which were as follows:

(1) Each producer was to grant National Screen an expressly exclusive license to obtain and distribute standard accessories throughout the United States.

(2) Each producer was to agree that it would not itself distribute any standard accessories anywhere in the United States.

(3) National Screen was to agree to enlarge its national distribution facilities by acquiring a large number of additional exchanges at a cost of millions of dollars.

(4) National Screen was to agree to pay each distributor a "share of the profits," amounting to hundreds of thousand of dollars.

This scheme was actually launched on February 1, 1940, the date when two such license agreements, made with Paramount and RKO, went into effect.

It is plain that both National Screen and its two licensors expected more producers to be in at the "kickoff," and plaintiff will be able to show that negotiations with other producers were in progress at the time when the Paramount — RKO agreements were signed. Ultimately, indeed, all of the eight major producers joined the scheme, but, as will hereinafter more fully appear, complications set in, and it took considerable time, and a lot of doing, to erect the 100% complete national monopoly that was in contemplation at the beginning. Indeed, even up to the present time the conspirators have been unable to make the machine work perfectly, although just before the time when this Court made public its first decision in the instant case they seemed to be on the verge of doing so.

III
THE FIRST EFFECTS OF THE LAUNCHING OF THE CONSPIRACY

The signing of the aforesaid Paramount — RKO exclusive agreements was fully announced and explain-

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ed in all of the trade papers and periodicals published at the time. These announcements expressly disclosed the existence of the aforesaid plan, and the specific intent to eliminate all of the then existing poster renters by denying them any possibility of obtaining supplies of accessories. An illustrative photostatic copy of one of these trade-paper announcements is annexed hereto as Exhibit A.

Moreover, plaintiff is able to prove that when the scheme was launched National Screen's top executives issued written directives to its branch managers expressly warning them to distribute accessories only on a *rental* basis, to *exhibitors* only, and to make absolutely sure to retake possession of all of them so that none of them could reach the hands of a poster renter. A copy of the pertinent portions of one of these interoffice directives is as follows: —

"From Mr. Geo. F. Dembow
"To ENTIRE SALES PERSONNEL

"Subject Matter Advertising Accessories, Inc.
"On February 1st, National Screen Service takes the second most momentous step of its business career. The first occurred with the creation of the company some twenty-one years ago when the trailer was conceived. Now it is Advertising Accessories, Inc., the corporate subsidiary that will handle the Standard lobby accessories formerly services by the producer distributors.

"ON FEBRUARY 1st WE BEGIN SERVICE ON PARAMOUNT AND RKO PICTURES. ABOUT FEBRUARY 15th WE WILL HAVE SERVICE AVAILABLE ON UNIVERSAL. OTHERS WILL FOLLOW, AND AS RAPIDLY AS SUCH ARRANGEMENTS ARE CONSUMMATED YOU WILL BE NOTIFIED.

"Remember this, for it is extremely important — our immediate objective is to serve all material exclusively on a rental basis. Under no circumstance or condition is there to be an outright sale. This is a departure from customary practice. We are well aware of it, and for that reason want to caution you now about it. There cannot be any extenuating circumstance of any kind that could possibly persuade us away from this decision. Actually it is more than a decision. Our agreement with the companies we represent on Standard accessories restricts us solely to a rental handling basis and under no pretext, and not at any price, do we have the right to sell this material.

"We are aware of the opposition that you may receive from circuits that have their own accessories departments for relay purposes, and likewise the poster renter that will require our lithographs and photos for their own rental plan. We have given this angle considerable thought and have decided upon the concession of permitting thirty days' notice to any circuit that may object on the ground that they have not been allowed sufficient advance notice covering our method of operation. For

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these cases, and the length of time specified, we are permitted (under authority received from the distributors) to continue the outright sale of material, but we want it confined strictly to the 'must' cases. Under no consideration, however, is this to apply to a poster renter. Consequently, caution must be exercised in the distribution of these exceptional outright sales, so that the material does not finally find its way into the hands of the poster renter. We will take an exhibitor's word once, but if we find that the material has been purchased under subterfuge we would be within our rights not to deal with them on a sale basis again under this thirty day notice period.

"We have very ambitious plans for Advertising Accessories, Inc. It will be our goal to streamline the lobby business, and we intend devoting our entire resources toward helping exhibitors advertise their pictures properly and at a reasonable cost, and with the type of material all smart showmen want. We expect that every theatre playing Paramount, RKO or Universal pictures will buy their lobby requirements from us covering releases of these companies. You will have a well rounded out list of material, making it possible for exhibitors to obtain their entire advertising requirements from us.

"Naturally in such a huge undertaking, a great task confronts use. Countless details

must be worked out toward proper establishment. In order to bring you up to date on all developments this outline is submitted — further particulars will follow. We want you to read this very thoroughly and familiarize yourself with the facts.

"Our new career will require careful thought and energetic effort toward giving it the proper sponsorship. The ground we have just broken establishes such a foundation. The responsibility of the sales organization on Standard accessories commences with your receipt of this letter. We expect every man to give of his best. Talk Standards the same as you do special accessories or trailers.

"Kindest regards.

/s/ "Geo. F. Dembow"

The launching of the said scheme actually brought about the almost immediate elimination of a large number of the local poster renters. That is to say, during the winter months of 1940 twenty-eight poster renters sold out their businesses, bag and baggage, to National Screen (see *Lawlor* finding of fact, Nos. 41, 42). More specifically, on or about February 17, 1940, a group of twenty-one poster renters sold out to National Screen at one and the same time, and National Screen caused this transaction to be prominently featured in the trade press, highlighted by a picture of the countenances of the surrendering victims. An illustrative photostatic copy of one of these trade-paper publications is annexed hereto as Exhibit B.

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Not all of the poster renters sold out, however, and, as will be seen, some of them have managed to remain in business even up to this time.

IV
THE FIRST TWO YEARS OF THE CONSPIRACY IN OPERATION

Immediately after the Paramount — RKO exclusive contracts went into effect, the surviving poster renters, or their successors, were denied any chance, at last theoretically, of obtaining any standard accessories for Paramount and RKO pictures, but the accessories for the other six major companies (known by the short names of Loew's, Universal, Columbia, United Artists, Warner and Fox) continued to remain available, by purchase, at the local exchanges of these six companies.

Just how plaintiff, and other local poster renters, managed to get along without any open access to Paramount or RKO accessories remains to be seen, but the establishable fact is that after February 1, 1940, the surviving poster renters, *and National Screen*, were able to, and did, purchase all desired supplies of the standard accessories of the aforesaid six uncommitted major companies at the local exchanges of those companies. At the time in question, the local poster renters and National Screen dealt with said six uncommitted companies on equal terms, and there was unquestionably real competition between the local poster renters and National Screen at this period of time.

But for obvious reasons, such competition could not continue indefinitely. As has been seen, National Screen had started going forward with a program of setting up a gross, or more, of local exchanges, involving an expenditure of millions of dollars, based on the supposition that all eight major companies would join in the plan, and plainly, therefore, something had to give somewhere. That is to say, either the uncommitted six companies — or most of them — would have to join up or the whole scheme would have to be abandoned. Obviously — plaintiff submits — a multi-million dollar distribution apparatus could not succeed on the revenue produced by adherence of only two of the expected total of all eight major producers.

Since very large sums of money had already been invested, the pressures presumably must have been enormous, but all that is clear is that the conspirators ultimately decided to move forward with their nefarious plans.

More specifically, on February 6, 1942, a third major producer, Loew's, Inc., — also known as MGM (Metro-Goldwyn-Mayer) — made its entry into the scheme by signing an exclusive license agreement bascially similar to the two preceding ones.

V

THE CONSEQUENCES OF THE ENTRY OF THE FOURTH CONSPIRATOR, LOEW'S, INC.

The entry of Loew's obviously made it more difficult, if not impossible, for the local poster renters to obtain supplies of accessories for Loew's picture.

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Consequently a group of local poster renters (twelve in number) on April 8, 1942, commenced an antitrust action against National Screen, Paramount, RKO and Loew's in the U. S. District Court for the Eastern District of Pennsylvania. This action has become known as the "Allied case".

The history and effect of the Allied case can best be shown by quoting the findings of fact made by the court in the *Lawlor* case, all of which findings of fact made by the court in the requests for findings submitted in the *Lawlor* case by all of the parties defendant in the instant case, and placed on the record of the instant case, without qualification, by National Screen: —

> "69. On April 8, 1942, plaintiffs herein and 12 other persons, firms or corporations, all alleging that they were engaged in leasing and selling to exhibitors standard accessories manufactured and issued by Loew's, Paramount Pictures, Inc., RKO and other producers of motion pictures instituted, as plaintiffs, an action in this court under the antitrust laws against National Screen and the corporations just named, as defendants, entitled ALLIED POSTER & SUPPLY CORPORATION, et al. v. NATIONAL SCREEN SERVICE CORPORATION, et al, being Civil Action No. 2472 (hereinafter called the "ALLIED" case).
>
> "70. In the complaint in the ALLIED case, plaintiffs herein and the others alleged,

among other things, that exclusive licenses from Paramount Pictures, Inc., RKO and LOEW's to manufacture and distribute standard accessories, and the contemplated licenses of a similar character from other major motion picture producers, constituted a violation of the antitrust laws, for which plaintiffs herein sought damages in the amount of $1500 and injunctive relief.

"71. In April 1943, after protracted settlement negotiations effected through respective counsel for plaintiffs and defendants, which extended over a period of several months, the plaintiffs and defendants in the ALLIED case entered into a settlement agreement by which the plaintiffs therein, including the present plaintiffs, agreed to and consented to the entry of an order of dismissal with prejudice by Judge Ganey of this court; and, by which the plaintiffs herein agreed and did deliver to National Screen a general release in its favor; and, by which National Screen agreed and did grant to the plaintiffs herein who agreed to and did receive a sub-license under which National Screen undertook to make available to the plaintiffs herein for distribution by them for motion picture exhibitors a full supply of whatever standard accessories National Screen was then manufacturing under the licenses from Paramount Pictures, Inc., RKO and Loew's then in effect, as well as all standard accessories which National Screen might be licensed to manufacture un-

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der any licenses subsequently procured by it from any other producers."

The result of the settlement of the Allied case was to persuade, or help to persuade, the then remaining uncommitted five major film companies to join the conspiracy. Specifically all five of these companies proceeded to sign exclusive license agreements substantially the same as the three preceding agreements, at various intervals of time, as follows: —

August 1, 1944 — Universal
April 12, 1945 — Columbia
January 21, 1946 — United Artists
March 12, 1946 — Warner
July 1, 1947 — Fox

With respect to the effect of the signing of the Universal contract, both Universal and National Screen requested the court in the Lawlor case to find, and the court did find, the facts to be as follows (Findings No. 77, 78, 79): —

"77. In forming its decision to enter into the standard accessory contract, Universal Pictures Company, Inc. took into consideration the settlement by agreement of the ALLIED case and as a result of the terms thereof regarded itself as entirely free to enter into such contract.

"78. In negotiating the Universal Pictures Company, Inc. contract, National Screen's president, Robbins, relied upon the settlement

agreement between plaintiffs and National Screen made in 1943, under which, among other things, plaintiffs expressly agreed that any exclusive licenses from motion picture producers to National Screen then in effect or subsequently acquired, were valid, and that plaintiffs were to, and did thereafter, receive as sublicensees, their requirements of all types of standard accessories manufactured by National Screen under its exclusive licenses from the producers.

"79. Upon obtaining the license to produce, by causing to be manufactured, and to distribute standard accessories for motion pictures of Universal Pictures Company, Inc., National Screen advised the plaintiffs of the license and of the availability to the plaintiffs of standard accessories produced by National Screen for Universal Pictures, pursuant to the sub-license agreement. The plaintiffs thereupon and during the entire period in suit ordered and received their requirements of Universal standard accessories from National Screen. Thereafter, plaintiffs acquired from National Screen, rather than from the local exchange of Universal Film Exchanges, Inc., all of the plaintiffs requirements of Universal standard accessories."

Substantially the same findings were requested by the defendants involved, and made by the court with respect to the other four contracts as follows: —

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Columbia, Nos. 83, 84, 85
United Artists, Nos. 90, 91, 92
Warner, Nos. ____*, 104, 105
Fox, Nos. 109, 110, 111.

VI

THE IMPORTANCE OF NATIONAL SCREEN'S SUB-LICENSE AGREEMENTS

With further reference to the defendants' reliance upon National Screen's practice of granting sub-license agreements, plaintiff notes that the trial court in the *Lawlor* case found as a fact, exactly as requested by National Screen, as follows (Finding No. 115): —

> "115. Since the settlement of the ALLIED case in 1943, National Screen granted 24 sub-licenses to distribute the copyrighted standard accessories the preparation or manufacture of which it procured, to poster-renters, 11 of whom were not plaintiffs in the ALLIED case — and at least 4 of whom were not in the business at the time of the settlement of the ALLIED action. In 1944, sub-license agreements were made with such poster-renters in Boston and Charlotte; in 1946 with such poster-renters in Baltimore, Dallas, Kansas City, New Orleans, St. Louis and Oklahoma City; and in 1948 with such poster-renters in Pittsburgh, Memphis and Detroit. The sub-licenses to poster-renters who were not involved in the 1943 settlement were granted subsequent to the ALLIED settlement and

* Warner did not request a finding comparable to Universal No 77, Columbia No. 83, United Artists No. 90 and Fox No. 109, and, accordingly, the court made no such finding in the case of Warner.

at a time when there was no litigation pending against National Screen."

Moreover, in the *Lawlor* case the defendants requested the court to find, and the court did find, not only, as aforestated, that the sub-licensees were permitted to buy supplies in unlimited quantity but that they also were required to pay only specially fixed low prices that were even less than the prices which the film companies charged when the accessories were supplied by them. (See Findings Nos. 128, 129; and compare Findings Nos. 114, 120, 122, 126, 127.)

Notwithstanding the foregoing, the plaintiff in this case will prove, by documentary evidence, that plaintiff never had a sub-license agreement because of the fact that National Screen has repeatedly and adamantly refused plaintiff's requests for a grant of such a sub-license.

As far as is known, plaintiff is the only poster renter in the country who has asked for and been refused a sub-license.

Further in this connection plaintiff will prove that during the period when National Screen was making supplies available, plaintiff was permitted to buy only an inadequate quantity of supplies and was required to pay top prices.

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VII

EFFECT OF THE NON-EXCLUSIVE RENEWAL CONTRACTS

All but one (viz., Loew's) of the exclusive agreements expired at the end of the year 1949, and in 1950 the defendants, obviously alarmed at the charges being made against them (the *Lawlor* suit was filed in August, 1949) began to write "non-exclusive" renewal agreements.

This proved, however, to be merely a change in the use of words because in all of the renewal agreements the film company licensor promised National Screen that it would not grant a license to any would-be competitor unless the applicant agreed that he would undertake to conduct his business on a national scale and had, or would get, a "national distribution organization."

As long ago as July, 1951, a United States trial judge (James P. McGranery, who later resigned in order to take the position of attorney general in the cabinet of President Truman) had the following to say about these defendants' changeover from "exclusive" to "non-exclusive" (Lawlor v. National Screen Service Corp., 99 F. Supp. 180, 186): —

> "The exclusive nature of the original contracts between National Screen and the producer-distributors indicates, indeed, a manoeuvre 'actuated solely by a desire to prevent competition.' The renewal contracts which are in

terms 'non-exclusive', demonstrate the same motivation. The producer-distributors agree not to produce or distribute advertising materials themselves, and their right to license anyone in addition to National Screen is made dependent on the assumption by such licensee of the obligation to operate as extensively in scope as does National Screen. Inasmuch as National Screen is the only concern, other than the producer-distributors themselves, which has ever operated on such a scale — producing and distributing all three types of advertising materials on a nationwide basis — potential competition is rendered impossible among existing business concerns."

At the trial of this case, plaintiff will, with leave of court, request the jury to compare defendants' present position regarding exclusivity vis-a-vis a national distribution apparatus with the position they took when this conspiratorial scheme was launched back in 1939-40. That is to say, plaintiff will show the jury that when, in the *Lawlor* case, National Screen and Paramount felt obliged to explain why they made their contract exclusive, they joined each other in requesting the court, successfully, to find the facts as follows (Findings Nos. 34, 35): —

"34. In the latter part of 1939, Paramount Pictures, Inc., desiring to avoid future losses which continuance of the production and distribution of standard accessories appeared to entail, approached National Screen with a

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proposition for the turning over of this function to National Screen. To ensure wide and prompt distribution of standard accessories to its customers, Paramount Pictures, Inc. required National Screen to operate a local branch in each city where Paramount Pictures, Inc. had a film distributing exchange. National Screen was required to open new exchanges throughout the country at its own expense and to employ the required sales staff in each exchange. In addition, National Screen was required to manufacture and distribute a full line of standard accessories for Paramount pictures, i.e., a full supply of all the different types of such accessories, and Paramount Pictures, Inc. required that National Screen purchase its existing inventory of standard accessories which entailed payment of a substantial sum by National Screen to Paramount Pictures, Inc.

"35. The opening of new exchanges throughout the country required National Screen to assume leasehold and other obligations and required an investment involving millions of dollars. To protect its investment, National Screen in its negotiations with Paramount Pictures, Inc. required that it be given an exclusive license to produce and distribute Paramount standard accessories for a five year term."

VIII

EFFECT OF THE *LAWLOR* DECISION

Plaintiff accepts the Lawlor decision in great part, if not in its entirety. As has been seen, the findings were to the effect that the plaintiff, Lawlor, received supplies so abundantly, and at such low prices, that plaintiff suffered no loss (Finding No. 138) but actually grew so rich (Findings Nos. 122, 123, 127) that he might well be said to be estopped on the ground that he was a beneficiary of the conspiracy (conclusion of Law No. 8).

There is nothing in *Lawlor* to help the defendants (1) in refusing to grant plaintiff a sub-license, or (2) in cutting off availability of supplies absolutely in 1961.

Indeed, in discovery proceedings plaintiff has requested defendants to admit the truth of a large number of specific findings in Lawlor, but defendants have objected to answering these requests in such a way as to show that they would prefer now to turn their backs on *Lawlor*, notwithstanding that the whole 140 *Lawlor* findings were placed on the record by National Screen in support of its motion for summary judgment in this very case.

IX

EFFECT OF THE 1957 GOVERNMENT CONSENT DECREE

In 1953, the United States commenced a civil antitrust action against these defendants in the U. S. Dis-

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trict Court for the Southern District of New York (Civil #75-138, 1953; CCH Trade Cases, 1957, par. 68,-670).

The complaint filed by the Government very properly contained, inter alia, the following allegations.

"*OFFENSES CHARGED*

"34. National Screen has attempted to monopolize, has monopolized and is monopolizing the aforesaid interstate trade and commerce in the manufacture and distribution of standard and specialty accessories in violation of Section 2 of the Sherman Act (15 U.S.C. § 2).

"35. National Screen has effectuated the aforesaid attempt to monopolize and monopolization by:

"(a) manufacturing and distributing substantially all standard and specialty accessories distributed in the United States;

"(b) acquiring the assets of a substantial number of poster exchanges and manufacturers and distributors of standard and specialty accessories in the United States;

"(c) controlling and limiting the extent to which substantially all other poster exchanges compete with National

Screen in the manufacture and distribution of standard and specialty accessories by, among other things, requiring each of them to agree with National Screen that:

"(1) it will rent all accessories needed by it from National Screen; and

"(2) it will distribute such accessories only within a specified geographical area.

"(d) instigating and engaging in the hereinafter described combination and conspiracy among the defendants named in this count.

"36. All the defendants named in this count are engaged in a continuing combination and conspiracy that began about 1939 and has continued up to and including the date of the filing of this complaint, in unreasonable restraint of the aforesaid interstate trade and commerce in the manufacture and distribution of standard and specialty accessories in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

"37. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants named in this count, the

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substantial terms of which have been that they agree that:

"(a) only National Screen will be authorized by the other defendants to make and distribute standard and specialty accessories for the motion picture films produced or distributed by said other defendants; and

"(b) the defendants other than National Screen will not themselves make and distribute standard and specialty accessories.

"38. To effectuate the said combination and conspiracy the defendants have done those things which they are alleged herein to have agreed to do.

"39. The defendants threaten to continue, and will continue, said violations of Sections 1 and 2 of the Sherman Act unless the relief hereinafter prayed for in this complaint is granted."

Regrettably, however, the case was allowed to lie dormant for a matter of years, without any hearings of any kind, until finally, in 1957, it was settled and ended, without findings, by the entry of a consent decree which dismally failed to provide any relief for the oppressed poster renters, living or dead.

Specifically, the decree merely provided that although distribution licenses must be non-exclusive the film companies could reject all applicants who could not show that they could conduct their business on a national scale and actually had, or could get, a national distribution organization.

As aforesaid, this was no more than had already been provided in the first renewal contracts of 1950, and, in view of National Screen's admission in *Lawlor* that it could not even have got started on its multi-million dollar project without the benefit of years of exclusive privileges, the government decree can only be looked on by plaintiff as a cruel hoax.

But this matter need not be further labored because both this Court, and the Court of Appeals, have definitively held that since plaintiff was not a party to the Government suit, and was not heard in any way whatsoever, the defendants cannot use the decree as a shield in this case.

Respectfully submitted.

_____

Nolan B. Harmon

_____

Francis T. Anderson

Attorneys for Plaintiff

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DEC 21 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 75-1018

COLUMBIA PICTURES INDUSTRIES, INC.,

Petitioner

versus

THE POSTER EXCHANGE, INC.,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT

On or about March 23, 1976, counsel for the respondent were notified by letter from the Clerk that the Court had requested that ". . . a response be filed in this case."

The reason why no response has heretofore been filed is that counsel believe that in view of all the facts and circumstances the petitioner's prayer for a writ of certiorari in this case should be granted.

More fully, the respondent agrees with petitioner's contention that the court below has misconceived the true meaning and effect of the doctrine of collateral estoppel.

More specifically, we agree with the contention that the petitioner is as much entitled to invoke the doctrine

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of collateral estoppel as any of its co-defendants, all of whom the court below has exonerated on the strength of the doctrine.

By saying this, we do not mean to admit that the petitioner should be exonerated, but we believe that the best interests of all concerned, including the public interest, would be best served by issuance of a writ of certiorari in this case.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE

I certify that copies of the above and foregoing Response have been forwarded to opposing counsel by depositing said copies in the United States Mail, with proper postage affixed, on this 21st day of April, 1976.

C. ELLIS HENICAN, JR.